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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. _____

WESTERN FIRE & CASUALTY COMPANY,
Petitioner

vs.

GENERAL INSURANCE COMPANY
OF AMERICA, ET AL, *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Western Fire & Casualty Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 31, 1957.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 179-191) is reported at 241 F.(2) 289.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered and entered January 31, 1957 (R. 192), and a copy thereof is attached to this petition at page 17, Appendix. Rehearing was denied February 26, 1957 (R. 206). The Court has jurisdiction under *28 U.S.C. 1254(1)*.

QUESTIONS PRESENTED

1. Whether a court can impute knowledge of an agent to his principal so as to bind the principal on a contract, when the agent negotiating the contract acts in collusion with the contracting party, and when both the agent and contracting party fully understand that the agent has no authority from the principal to make such contract.

2. Whether a trial court's findings of fact may be disregarded under *Rule 52(a)* as being clearly erroneous, where all facts found are supported by the written record and by oral testimony, and such facts are neither improbable nor unreasonable conclusions, inconsistent with any other proof, nor contrary to human nature and conduct, and where the setting aside of such findings will amount to the court's sanction of improbity, deceit and malversation.

3. Whether an automobile can be a "newly acquired automobile" within the meaning of the standard automobile liability insurance policy where it is *not owned nor acquired by the named insured*, but by another, and the policy expressly defines such vehicles as one the "ownership of which is acquired by the *named insured* who is the owner of the described automobile."

4. Whether an insurance policy which is written as requested by the applicant-mother can be reformed to show ownership of the insured automobile in a minor son in order to cover a loss,

where there is no claim nor proof of any mistake, accident, misunderstanding or other reason for such reformation, particularly when the applicant-mother, the minor son, and the agent taking the application all agreed that the policy could not be written originally if it showed ownership in the minor son.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The Declaratory Judgment Act, *62 Stat. 964 (1948)*, as amended, *63 Stat. 105 (1949)*, as amended *68 Stat. 890, 28 USC Sec. 2201 (1954) (Supp. 1956)*, and pertinent portions of Federal Rules, *Fed. R. Civ. P. 52(a)* are set out in the Appendix, p. 16.

STATEMENT OF THE CASE

Following an accident causing damages which either petitioner or respondent must ultimately pay, third party claims for such damages were settled and paid by respondent, under an agreement with petitioner that this declaratory judgment action should determine which of the two companies' policies of automobile liability insurance is valid primary insurance as to the accident (R. 109). No claim for damages to any injured third parties nor question of indemnifying any insured is in question, the former having been compensated for their damages, and the latter having been discharged from claims arising from the accident. Jurisdiction of the District Court was based upon diversity of citizenship (R. 2).

The trial court sitting without a jury found that

the 1950 Plymouth automobile described in petitioner's policy was actually owned by Sherman Jones who was a minor (R. 22), but that title thereto was in Eunice V. Jones and her son Sherman Jones, whose age was known to petitioner's agent Sam Hutson when the policy was written (R. 21). The trial court found that agent Hutson had no authority to issue a policy insuring an automobile owned or partly owned by a minor (R. 22), which fact was known to Eunice V. Jones and Sherman Jones. He further found that petitioner's policy was issued by it in reliance upon a false, material misrepresentation of the named insured Eunice V. Jones that she was the sole and unconditional owner thereof (R. 25), and that the named insured Eunice V. Jones, her minor son Sherman Jones, and petitioner's agent Sam Hutson acted in collusion to conceal from petitioner the true ownership of the automobile and evade its rule against the issuance of a liability policy on an automobile owned by a minor (R. 22).

The automobile actually involved in the accident was a 1951 Ford driven by Mrs. Lola Cutshall, sister of Sherman and daughter of Eunice V. Jones (R. 23), and had been obtained by Sherman on or after his twenty-first birthday when he traded the 1950 Plymouth and took title thereto in his own name (R. 57, 132).

The accident occurred less than 30 days after the acquisition of the Ford automobile by Sherman Jones (R. 98). Mrs. Cutshall and her husband owned an automobile insured by respondent (R. 102), and it is

petitioner's position that such policy covered the accident in question.

The trial judge concluded that petitioner's policy issued upon the misrepresentation of the named insured, and as a result of collusion of the agent with the insured and her minor son, was void (R. 29). He further concluded that the Ford involved in the accident was not a newly acquired automobile, ownership of which was acquired by Eunice V. Jones (R. 29), with a result that, in no event could the petitioner's policy be made to protect Mrs. Cutshall nor require petitioner to answer for damages caused by her.

Judgment of the trial court was reversed by the Court of Appeals for the Fifth Circuit, that court holding that the findings of the trial judge are without foundation, and that not only did petitioner's agent have authority to bind petitioner on the risk, but also that petitioner's policy should be reformed, so that Sherman Jones would be named as the sole and unconditional owner and the policy would apply to the Ford automobile involved in the accident.

Within a short while after the accident petitioner cancelled its policy (R. 48, 68, 69), returned the premiums (R. 59, 60), and they have been retained by named insured (R. 61). Respondent had due notice of this cancellation (R. 137).

REASONS FOR GRANTING WRIT

Since the decision of the Court of Appeals for the Fifth Circuit reforms an insurance policy so as to bind the insurer on a risk which applicant and the issuing agent knew could not be underwritten by the agent because of prohibitory rules of the insurer, and because this result can be reached only by a disregard of fact findings which indeed have support in the record and by ignoring a basic rule of agency law, the decision should be reviewed and corrected in the interest of justice and fairness.

1. The fundamental premise of the court below was that the trial court's findings of fact in two respects are without support. First, it was held by the court that there is no evidence of misrepresentation of ownership by the named insured Eunice V. Jones. That Mrs. Jones did not actually testify verbatim "I misrepresented ownership of the automobile," is hardly reason to sweep aside findings which were made by the trial judge after hearing not only the named insured, but also after having heard her minor son and the issuing agent describe the transaction in which the named insured requested the agent to issue the policy in her name.

Evidence enough of the misrepresentation is the policy itself, which provides that:

> "24. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and ance upon the truth of such representations and representations, that this policy is issued in reli-

> that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance." (R. 20, 51)

and which recites

> "Item 6. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile except as herein stated: no exceptions" R. 48).

It is fully agreed by all concerned that the agent refused to issue the policy showing the minor son, Sherman Jones, as the named insured, because he lacked authority to do so. The agent testified he lacked authority (R. 73, 83, 92); the mother did too (R. 56, 142), and the minor fully agreed (R. 124, 129, 131, 132-133).

With this background, and all parties to the transaction being acutely aware that no policy could issue to Sherman Jones the minor, and another agent having likewise refused to issue such a policy (R. 127), the named insured and mother Eunice V. Jones requested the agent to write the policy *in her name.*

> "Q. And for that reason, so the company would take the policy, you told him to put it in your name?
>
> "A. Yes, sir, I sure did.
>
> "Q. Even though the car actually belonged to Sherman; is that right?
>
> "A. Yes, sir." (R. 56).

If the trier of fact was not justified in finding on

the basis of the testimony of the participants as above referred to, and the declarations of the named insured in the policy itself, above quoted, no fact found by any court or jury would in any case be secure against assault.

If there is nothing else, there is proof positive that the declarations in the policy itself are false, and by the very terms of the policy, such declarations are made the named insured's upon acceptance by the insured. Not only is this general law, finding expression as long ago as 1842 in this Court[1], but it is specific in its applications to situations such as this case. Where the policy, as here, is accepted by the named insured, any misrepresentations contained therein have been made, in so far as the right of the insurer to avoid the contract is concerned. Such cases as *Hawkeye Cas. Co. vs. Western Underwriters Assn.* (S. C. Idaho 1944) 53 F. Supp. 256; *Trinity Universal Ins. Co. vs. Woody* (DC.-N.J. 1942), 47 F. Supp. 327, illustrate this point, overlooked entirely by the court below.

Any doubt that false declarations in the policy constitute misrepresentation sufficient to relieve petitioner is set at rest by Texas courts. *Harris vs. Allstate Ins. Co.*, Tex. Civ. App., 249 S.W. 2d 669 (1952) writ

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1 Mr. Justice Story (Carpenter v. Providence Washington Insurance Co., 16 Pet. 495, 41 U.S. 495, at page 511, 10 L. Ed. 1044):

". . . we see no reason why, as these clauses are a known part of the stipulation of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which, upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations which, but for those stipulations, would not have been entered into . . ."

refused (misrepresentation as to previous policy cancellations); *Trinity Universal Ins. Co. vs. Winter*, Tex. Civ. App., 67 S.W. 2d 926 (1934) (misrepresentation of motor number). Here there is no room for argument over whether there was a misrepresentation. Under the undisputed facts there was a false, material misrepresentation.

2. That the agent lacked authority to enter into the contract first proposed by the named insured—showing the minor as the owner of the automobile—can hardly be disputed in light of his testimony. The agent knew he could not issue a policy insuring the minor (R. 73); the mother-applicant was so advised (R. 56), and the minor son heard and understood the denial of authority (R. 131-132). The Court of Appeals uses the testimony of Special Agent Watkins to override findings of the trial judge and to hold that the agent Hutson in fact did have the authority he disclaimed.

In so construing the testimony of agent Watkins the court below has failed to distinguish between the authority of agent Hutson in insuring *youthful drivers*, and the lack of authority (as established by both Hutson and Watkins) to insure *minor owners* of automobiles.

To reach the conclusion that the trial court erred in holding petitioner's policy void for misrepresentation, it was held below that there was no misrepresentation as to ownership. If there was in fact no misrepresentation of ownership, then Mrs. Eunice V. Jones was the owner. But as is readily apparent, if this fact is accepted, there can be no coverage for the Ford in-

volved in the accident, for the reason that ownership of the Ford was not acquired by the named insured Eunice V. Jones, as is required by the "newly acquired automobile" clause of the policy (R. 22, 49).

In order to avoid this result, the court below has said it will reform the contract to show Sherman Jones the minor as the named insured in petitioner's policy. This reasoning however reckons without a consideration of the admitted fact that both Sherman Jones and Eunice V. Jones knew the agent had no authority to issue a contract binding petitioner as to a minor named as the owner of the insured automobile!

To overcome this obstacle, it is necessary to say that in fact agent Hutson had authority he said he did not have, and to do this on the basis of the testimony of agent Watkins. An examination of this line of reasoning in light of what was actually said by the witnesses will impress upon the Court the fact that the trial court was right not only on the facts but on the law, and that the judgment of the trial court was improperly overturned.

Where no actual authority exists, the theory of estoppel is used to establish liability of a principal for action of an agent. Such theory is predicated on the assumed fact that those dealing with the agent may justifiably rely upon what seems to them to be authority. Where those dealing with the agent are positively advised that there is no authority however, where is there any room for the application of estoppel? Even if, as held by the Court of Appeals below, the agent's authority cannot be established by declarations of the

agent, surely the agent's denial and disclaimer of authority completely removes the basis for any estoppel. This is clear law, the benefit of which petitioner has been denied by the decision which it seeks to have corrected. "If a third person has notice of a limitation of an agent's authority, he cannot subject the principal to liability upon a transaction with the agent in violation of such limitation."[1]

Notwithstanding this sensible rule of law, and although the agent advised Eunice V. Jones and Sherman Jones that he could not write the policy showing Sherman Jones as the owner and named insured, the Court of Appeals for the Fifth Circuit nevertheless writes this very contract and imposes its liabilities on petitioner. Even though the agent was prohibited from binding petitioner, the court below apparently was not, and the only possible explanation of the holding is that the court considered the agent had actual authority. This too necessitates striking down a fact finding of the trial court.

How the trial court's finding of lack of authority in the agent to issue a policy on an automobile owned by a minor can be set aside as "clearly erroneous" is a matter which admits of grave doubt in light of the evidence supporting the trial court. And although petitioner concedes that the findings of a trial court based upon oral testimony and first-hand observation of the witnesses may be reviewed, there seems to be little logic in a rule which permits such findings to be disre-

[1] Restatement, Agency, Sec. 166, Comment a (1933); Tex. Annot. (1941) and see Reo Motor Car Co. of Texas vs. Barnes, Tex. Civ. App., 9 SW(2) 374, 377.

garded when they are borne out by the record expressly and by implication from reading between the lines.

Over objection of respondent whose counsel thought it immaterial, agent Watkins testified positively that if agent Hutson knew the automobile belonged to Sherman Jones and wrote the policy in the name of Mrs. Jones, he was not representing the petitioner, according to his instructions (R. 173-174). He was not cross examined on this matter. He further testified that under some circumstances the agent could insure *youthful drivers* (R. 166), but he did not at any time say that any agent of petitioner could with authority bind petitioner on a liability policy covering an automobile owned in whole or in part by a *minor*. Even as to youthful drivers according to Watkins, agents of petitioner were prohibited from writing liability policies for applicants who were unmarried and using the automobile away from home. (R. 167).

There is no escape from the conclusion that the court below was in error in saying that petitioner knew what its agent Hutson knew (241 F(2) 294), because only by imputing the agent's knowledge can this be said. In the ordinary case the court would be correct, but in this case the mistake stands out clearly. In the usual case the person dealing with the agent may presume that the agent will give the principal notice. "But this general rule does not apply when the third party knows there is no foundation for the ordinary presumption—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal." *Mutual Life Ins. Co. vs. Hilton-Green*, 36 Sup. Ct. 676, 241 US 613, at 622, 60 L. E. 1202

(1915). Where the agent deliberately conceals from the principal the true facts, and the action is acquiesced in by the third party, there is collusion, and the principal is not bound. *Standard Savings & Loan Assn. vs. Fitts*, 120 Tex. 303, 39 S.W. 2d 25 (1931).

The agent of petitioner here agreed that if the applicants for the insurance policy would help him, he would help them (R. 139). Since they were dealing with the agent with knowledge of his limited authority, they cannot hold the principal liable on an unauthorized transaction. *McComb vs. Quaker Oats Co.*, 5 Cir. 187 F. 2d 422; *American National Bank vs. Bartlett*, 10 Cir., 40 F. 2d 21; *General Contract Purchase Corporation vs. Sumner*, Tex. Civ. App., 49 S.W. 2d 960, writ dism. woj. If they cannot hold petitioner on an unauthorized transaction, why should the court below be able to do so?

Texas Courts[3] as well as others[4] have recognized that a positive statement as to the sole and unconditional ownership will void the policy, and the test is not whether the insurer was influenced, but whether the true facts as stated might reasonably have influenced the insurer in deciding whether to accept or reject the risk. *Allstate Insurance Co. vs. Moldenhauer*, 7 Cir., 1952, 193 F. 2d 663, 665.

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[3] Hamilton vs. Firemen's Fund Ins. Co., Tex. Civ. App. (1915) 177 SW 173, writ ref.

[4] Didlake vs. Standard Ins. Co., 10 Cir. 1952, 195 F(2) 246; Kelly Contracting Co. vs. State Automobile Mut. Ins. Co., Ky. App., 240 SW (2) 60; Hudson Casualty Ins. Co. vs. Garfinkel, 161 A. 195, 111 N.J. Eq. 70 (1932) (agent's knowledge not company's knowledge); Farm Bureau Mut. Auto. Ins. Co. vs. Georgiana, 82 A(2) 217, 14 N.J. Super. 459 (1952) (collusion of agent and insured, as here, on material fact); Maryland Cas. Co. vs. Powers (D.C.-Va. 1953) 113 F. Supp. 126.

The court below at the instance of a stranger—the respondent—has done what petitioner forbade its agent to do: it made a contract binding petitioner on an automobile owned by a minor.

Petitioner has thus been bound on a contract which the Court of Appeals says was validly issued because agent Hutson had authority to incorrectly describe the ownership of the automobile (241 F(2) 295). Yet the court by this holding is ascribing to the agent qualities and capacities which he himself refused to admit. Had he thought he could have done so, no doubt he would have originally issued the policy the court says he could validly issue. This he consistently refused to do according to all parties to the transaction. By a process of strained reasoning, petitioner's policy has been reformed by the court so that it insures a minor owner, when the minor owner, his mother, and the agent all agreed that the policy could not so issue! To pass the matter off as a mere misdescription of ownership, and susceptible of reformation as such, is to cavalierly dismiss principles of agency.

If the agent did know of the ownership of the minor (R. 139), there was nothing to impute to petitioner, and there was a misrepresentation as to ownership which should void the policy. If the agent did know of the ownership of the minor, then the law should not impute such knowledge to the petitioner, when the trial court examined the testimony and found collusion between the applicants for the policy and the agent (R. 22).

In any event, this is not the rare case justifying the complete disregard of trial court findings, because

they are neither clearly erroneous nor otherwise inconsistent with the proof in the record. *Joe Gibson vs. Phillips Petroleum Co.*, 1957, 1 L. Ed. 2d 77, granting certiorari.

CONCLUSION

Petitioner has a right to a fair adjudication of its rights, with an application of fundamental rules of law to the facts. There should be no obligation imposed upon it by a court in disregard of law.

Petitioner is likewise entitled to have fact findings of a trial judge stand unless they are clearly erroneous, which they are not under this record.

There is more than an improper decision on the law and a disregard of supported fact findings in this case, however. Not only is the decision of the court below in conflict with the principles announced in *Didlake vs. Standard Ins. Co.*, 10 Cir. 1952, 195 F. 2d 246, it is a stamp of approval upon collusive conduct. Such a decision should be reviewed and corrected, and petitioner therefore respectfully prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

28 USC Sec. 2201 (1954) (Supp. 1956):

"Sec. 2201. Creation of Remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended Aug. 28, 1954, c. 1033, 68 Stat. 890."

Rule 52(a) Fed. R. Civ. Procedure:

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

JUDGMENT

Extract from the Minutes of January 31, 1957

No. 16196

General Insurance Company of America, And Interveners, Sherman L. Jones, Et Al.

versus

Western Fire & Casualty Company

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and here rendered to declare that Western Fire & Casualty Company is liable to the full extent of the limits of its policy and General Insurance Company of America is liable only for the excess, if any;

It is further ordered and adjudged that the appellee, Western Fire & Casualty Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

In The
United States Court of Appeals
For the Fifth Circuit

No. 16196

General Insurance Company of America,
And Interveners, Sherman L. Jones, et al.,
Appellants,

versus

Western Fire & Casualty Company,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

(January 31, 1957.)

Before HUTCHESON, Chief Judge, and JONES and BROWN, Circuit Judges

Brown, Circuit Judge: Here, as now elsewhere so common, e.g., *Continental Casualty Company v. Suttenfield*, 5 Cir., 236 F.2d 433, 435; *United Services Automobile Assn. v. Russom et al* [16298], 5 Cir., . . . F.2d . . ., the traffic accident has become a mere incident to the vigorous battle between insurers, each of whom by a full use of fluid inconsistent defenses reminiscent of common law pleading disclaim all liability but then assert that another, not it, is liable. *Maryland Casualty Co. v. Southern Farm Bureau Casualty Ins. Co.*, 5 Cir., 235 F.2d 679.

In that struggle, substituted for the forgotten circumstances of the occurrence are the collateral controversies, removed in time and distance, relating to the issuance of the policies, conduct and action of the assureds, underwriters, agents, application and construction of abstruse policy clauses, and the like.

So it is here:[1] if Western's[2] policy was in force on the Jones Ford, it is liable for all. If not, then Gen-

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On April 28, 1953, the Jones' Ford, while driven by Mrs. Lois Jones Cutshall with the permission and consent of her mother, Mrs. Eunice V. Jones, and brother, Sherman Jones (then in the car), hit a bicycle injuring (sic) the two young Kuykendall boys. On the eve of the State Court trial of that dangerous suit against the Cutshalls and Sherman Jones, settlement for $8,750.00 was made. By express agreement, the ultimate liability of the two insurers was to be determined by subsequent litigation—the instant suit, brought by Western against General for declaration of rights. The Joneses and Cutshalls intervened, joining common cause with General who sought recovery by cross action.

Western Fire & Casualty Company, through its Texas Recording Agent Sam Hutson, issued a Standard Texas Combination Automobile Policy dated November 20, 1952, listing Eunice V. Jones as "name of insured" covering a 1950 Plymouth sedan. Sherman Jones, the son, on April 10, 1953, his twenty-first birthday, traded the 1950 Plymouth for the 1951 Ford. Within thirty days (but after the accident) Agent Hutson transferred the insurance to the Ford as a substitute vehicle under Section IV(a)(4) of the policy: "* * * the word 'automobile' means:

> (4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if * * * it replaces an automobile described in this policy * * * The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

Mrs. Cutshall, under the Omnibus Clause, was an additional assured:

> "With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission * * *."

eral,[2] under the drive-other-car extension of its policy bears the whole loss.

The District Court, in a non-jury trial, held that (a) Western's policy was void because of misrepresentations by Mrs. Jones and her son Sherman concerning ownership of the 1950 Plymouth; and (b) the 1951 Ford was not a "newly acquired automobile" under Clause IV of the policy, note 2, *supra*.

Unlike *Didlake v. Standard Insurance Co.*, 10 Cir., 195 F.2d 247, 33 ALR 2nd 941, so much relied on by Western, where a willful, purposeful scheme was used to deceive both agent and company into believing that the named adult, rather than the minor for whom no insurance could be procured at all, was the sole owner and expected user of the car, this record compels the

---

[2] General Insurance Company of America had issued its Standard Texas Policy to Lola Jones Cutshall (and husband) covering a 1953 Studebaker (in no way involved in the accident). It contained the usual drive-other-car coverage extension:

"V. Use of Other Automobiles: If the named insured is an individual who owns the automobile classified as 'pleasure and business' * * * such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions * * * [none of which apply]."

But, General asserts, under the following policy provision, common to both policies, no liability would attach respecting Mrs. Cutshall's actions until other insurance (Western) available to Mrs. Jones as an additional assured was exhausted:

"18. Other Insurance—Coverages A, B, D, E, F, G, H, I and J: If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or *other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured either as an insured under a policy applicable with respect to said automobiles or otherwise.*" (Emphasis supplied)

conclusion and reflects an underlying approach that if there were misrepresentation, it is so merely because of what the law attaches to conduct. For nowhere is there a suggestion that mother or son were knowingly misstating, or attempting to conceal, facts, or that Agent Hutson was misled by these long-time acquaintances or was consciously doing wrong. The mother, a widow running a farm with all of its chores, taking in washing, doing cleaning and other odd jobs for support of her family, and Sherman, the twenty-year-old son just returned from Korea with a 100% total disability rating for war-inflicted wounds, were each ignorant of insurance and business matters. What they were trying to do—What the policy of the Texas Motor Vehicle Safety Responsibility Law, Art. 6701h, Vernon's Texas Civil Statutes, encourages its citizens to do, was to procure liability insurance protecting them and members of the public for the operation of the 1950 Plymouth car in the affairs of mother and son. In that process, they were attempting fully to state all of the facts, furnish all of the information and answer all of the questions. If it was not adequate, or if not fully understood by Agent Hutson, or correctly reported by him to the company, it was not because of anything which these two inexperienced people consciously did.

Title to the 1950 Plymouth was in the name of both mother and son. It was the third of a succession of used Plymouths purchased since the boy's return from war and needed by him in his frequent trips to Veterans Hospitals for treatment. The first, a 1941 model, was paid for entirely by the mother. Traded in

as a substantial payment for a second 1941 model, the balance on it was paid one-third by the mother and two-thirds by the son. With her consent, this was traded for the 1950 Plymouth. While the mother was liable as a co-signer on the Conditional Sales Contract, it was intended that Sherman would make all of the payments from his Government disability benefits.

Western's position, sustained below, was that while title was in (or partly in) Mrs. Jones, the car "really" belonged to the boy so that there was a breach of the representation[4] of ownership.

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[4] The face of the policy is described: "Declarations," Item 6 of which provides:

> "Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile, except as herein stated: . . . *no exceptions*"

Unlike the traditional fire insurance policy which makes the contract *void* if ownership is not absolute, see National Fire Insurance Company v. Carter, Tex.Com.App., 257 S.W. 531; St. Paul Fire & Marine Insurance Co. v. Culwell, Tex.Com.App., 62 S.W.2d 100, Western's policy merely states:

> "24. Declarations: By acceptance of this policy the named insured agrees that these statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

Since Western's attack is for a *misrepresentation* of a fact, not the absence of a contrary fact as a contractual condition, Article 21.16, Texas Insurance Code (formerly Article 5043, R.S. 1925) applies:

> "Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case.

In the discussion with Agent Hutson, mother or son, or both, stated the facts about the title and the co-signed notes. The mother, apparently because another agent had declined to issue a policy for the stated reason that the boy was a minor, asked if the insurance couldn't be put in Sherman's name. Hutson replied that he could not issue a policy to a minor, so it would have to be in Mrs. Jones' name. While it was done in this fashion, Agent Hutson manifested his full understanding that Sherman was the one principally concerned as the premium for liability, paid by Sherman's check for the precise amount (the mother paid for medical reimbursement coverage), was calculated under the Texas Manual Rate for drivers under age 25. And with the policy, he delivered to each of them in their respective names, an identification card showing that the 1950 Plymouth was issued by Western.

The Trial Court's findings of misrepresentation,[5] if a finding of fact as distinguished from the possible legal effect of conduct, lack requisite foundation and are thus clearly erroneously under FRCP 52(a). The testimony of mother and son was clear that they gave Agent Hutson the full facts concerning the nature of Sherman's ownership and interest in the car.[6] Con-

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[5] Findings of Fact: "9. The policy of Western * * * was issued by Western in reliance upon the representation of Eunice V. Jones that she was the sole and unconditional owner of the Plymouth automobile covered thereby.

"10. The representation of Eunice V. Jones that she was the sole and unconditional owner of the Plymouth automobile covered by the policy was a false and material representation, but for which Western would not have issued the policy."

[6] Western, whose whole neat structure rests on ownership by Sherman, proves this by conclusionary statements from these two lay persons, e.g.:

ceding that, as interested parties, the Court had wide latitude in rejecting it altogether, there is an entire want of evidence then to support the contrary fact—i.e., misrepresentation of sole ownership in the mother. This is so because Agent Hutson, as a witness, would neither admit nor deny that the Joneses had given the information testified to by them.[1]

On this analysis the findings, we think, were, in reality a conclusion that Western was deceived be-

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(By Mrs. Jones)

"Q. Now, the title to that car was in your name, wasn't it, and Sherman's name?

A. Yes, sir.

* * * *

Q. But the car actually belong to Sherman?

A. Yes, sir.

Q. Well, it was actually Sherman's car and you considered it that, didn't you?

A. Yes, sir."

What was the standard of his? Legal ownership, expected principal use, or the loose, everyday use in family life where terms of possession, privilege of use, responsibility for upkeep, etc., have little conscious relation to legal title, e.g.:

(By Mrs. Jones)

"Q. It was his car and you have no interest in it whatsoever?

A. Yah, I had an interest in it, yes, sir.

Q. Well, I know, but it was his car, you recognized—you weren't claiming any interest in it; is that right?

A. Well, in a way, yes, I was, because—

Q. Well now, was it yours and Sherman's car or was it Sherman's car?

A. Well, it was hissin mostly because he did all the driving, and I couldn't drive.

Q. Well, it was actually Sherman's car and you considered it that, didn't you?

A. Yes, sir."

[1] Indeed, the Trial Court, finding collusion by the three, seems to have credited the testimony of mother and son that Hutson knew all they knew (Finding No. 3):

"* * * at that time [of issuance of policy] Eunice V. Jones, Sherman L. Jones and the agent Hutson each knew that Western would not issue a policy covering an automobile owned or partly owned by a minor, and the three of them were acting in Collusion to hold knowledge of such fact from the company and evade its rule against the issuance of a liability policy on an automobile owned by a minor."

cause what Hutson knew was not imputable to it. This rests, in turn, on the assumption that Agent Hutson had no authority whatever to write insurance to cover liabilities of a minor owner. But there is no substantial foundation for this. By ingenious cross examination skillfully executed, mother and son, repeated extensively in the various shades presented by permissible leading questions, the idea that Hutson had told them he could not write a policy for minors and if he did, the company would send it back. The scope of agency can, however, hardly be established by such declarations of the agent, 2 Tex. Jur., Agency, §125; *Foote v. De Bogory*, Tex.Civ.App., 179 S.W.2d 983, error refused, WM; McCormick on Evidence, §244, p. 519 (1954).

Hutson's own testimony, had it stood alone, might possibly have permitted such a finding. But considered with the testimony offered by Western from a Special Agent having supervision over Hutson, it is clear that there was no prohibition making the issuance of a policy unauthorized, but that, at most, the company had certain underwriting policies and instructions which[3] the agents were to follow. But for

[3] E.g., minors owning automobiles were eligible for insurance: if married, if the company has coverage of other cars of the family or has other insurance business of the family. Additionally, since the only evidence of a prohibition was stated in terms of a single minor using the car away from home, a minor regularly making his place of residence at the home of his parents would likewise be eligible.

Sherman might have been eligible under two of these factors or at least Agent Hutson could have thought so.

In any case Western's effort to prove that the company would have rejected Sherman's application in his name showed quite plainly that the decisive factor to the Special Agent was Sherman's 100% disability rating—a matter wholly unrelated to the policy declarations which, with no warranty of physical fitness, committed this important element to the underwriting judgment and discretion of the Recording Agent Hutson.

manual laborers, truck drivers or insurance agents, failure to follow instructions in carrying out the principal's business entrusted to the agent, or mistakes made in an effort to apply them, is not equated with lack of authority, 2 C.J.S., Agency, §95, p. 1203; *Niagara Ins. Co. v. Lee et al*, Sup. Ct. of Texas, 73 Tex. 641, 11 S.W. 1024, *Manhattan Life Ins. Co. v. Stubbs*, Com.App.Tex. 234 S.W. 1099; *Dewey T. Ross Engineering Corporation v. Sonneman*, Tex.Civ.App., 159 S.W. 2d 200; *German Ins. Co. of Freeport, Ill. v. Gibbs, Wilson & Co., et al*, Tex.Civ.App., 92 S.W. 1068, 96 S.W. 760, error refused.

Assuming that declarations made by Hutson would charge mother and son with knowledge that he could not issue a policy in the minor's *name*, there was yet no evidence that it was contrary to instructions to effectuate family coverage by issuance of the policy in the parent-owner's name. Indeed, by the issuance of the policy in that form, collection of the premiums, issuance of identification cards, Agent Hutson thought he was doing what he was permitted to do. If he thought so, surely the mother and son, untutored in business or insurance affairs, were entitled to believe as much.

Western knew what Hutson knew. Hutson knew what the situation was. Committed to his judgment and discretion under the wide authority reposing in him as Local Recording Agent, Art. 21.09, Texas Insurance Code, was the proper underwriting evaluation of this risk as it was known and presented to Hutson. If his judgment, either in writing it or in devising the form of the policy, was faulty, the remedy is not

a *post* event cancellation of the policy for his acts were Western's acts. *Traders & General Insurance Company v. Lucas*,[9] Tex.Civ.App., 281 S.W.2d 188, error refused, NRE.

There was thus no fatal misrepresentation of ownership. At most, the words typed in the declaration by Agent Hutson were an incorrect description of the state of legal title—a thing immaterial, under these circumstances, to the attachment of the risk and in no way contributing to the contingency or event—the accident—on which the policy obligations became due. It was a binding contract, *Kuntz v. Spence*, Tex.Civ. App., 48 S.W.2d 413, reversed on other grounds Tex. Com.App., 67 S.W.2d 254; *Government Personnel Automobile Association v. Haag*, Tex.Civ.App., 131 S.W.2d 978, error refused; and see, *Mid-States Insurance Co. v. Brandon*, 340 Ill. App. 470, 92 N.E.2d 540; *Commonwealth Casualty Co. v. Arrigo*, 160 Md. 595, 154 Atl. 136; *Churchman v. Ingram*, La.App., 56 So.2d 297; *Pauli v. St. Paul Mercury Indemnity Co.*, 167 Misc. 417, 4 N.Y. Supp. 2d 41, affd. 255 App. Div. 935, 8 N.Y.Supp. 2d 691, application den. 280 N.Y. 853, 19 N.E.2d 685; Annotation 33 A.L.R.2d 948.

The policy was validly issued, and if ownership is incorrectly described, it should be deemed reformed accordingly, *Traders & General Insurance Co. v. Lucas*,

[9] An almost absolute parallel of the instant case, the opinion declines to follow Didlake v. Standard Insurance Co., supra, and cites with approval Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 6, §3629, p. 251: "Where an agent of the insurance company is aware of the fact that the insured is not the unconditional owner thereof, when he writes the policy upon the automobile, the insurer is charged with such knowledge and in consequence is deemed to waive the conditions in the policy with reference to the ownership of the automobile."

supra; Providence Washington Insurance Co. v. Rabinowitz, 5 Cir., 227 F.2d 300.

Once that is done, the 1951 Ford meets all of the requirements of a "newly acquired vehicle" under Clause IV, note 2, *supra*. Notice of its acquisition was given to Hutson within thirty days, and the transfer of the policy was actually made by Hutson, although in the mother's name to be consistent with the original issuance. The insurance automatically attaches on acquisition of a new vehicle subject only to being defeated by failure to give notice within thirty days. The intervention of the accident after acquisition but before reporting does not vitiate the insurance. See note 34 A.L.R. 2d, p. 944. The clause is a sensible one to meet the definite needs of the automobile age in which vehicles are routinely and frequently traded for the newer, brighter, longer, lower models.

With Western's policy effective, it is conceded that it was available to Lola Jones Cutshall as an additional assured. This automatically brought into play the provision in General's policy (note 3, *supra*) which prescribed that the drive-other-car extension agreement V, (note 3, *supra*) "shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobiles or otherwise." The effect of this is that Mrs. Cutshall did not have insurance with respect to other vehicles driven by her until she had reasonably exhausted coverage available to her elsewhere. And, when Western seeks to assert a contribution under the "Other Insurance" clause of its policy (identical with that of

General's, see note 3, *supra*), it is met with the the same proposition in different form since Mrs. Cutshall does not have "valid and collectible insurance against such loss." It is only when Western's policy has been exhausted that General becomes liable for the excess, and until that point is reached, Mrs. Cutshall, as named or additional assured, has no claim which she can assert. See Appleman, Insurance Law and Practice, Vol. 8, §4914, p. 333, followed in *Continental Casualty Company v. Curtis Publishing Company*, 3 Cir., 94 F.2d 710; *Aetna Casualty and Surety Co. v. De Maison*, E.D.Pa., 114 F. Supp. 106 (reversed other grounds, 213 F.2d 826); *McFarland v. Chicago Exp. Inc.*, 7 Cir., 200 F.2d 5; and see, *Continental Casualty Company v. Suttonfield*, 5 Cir., 236 F.2d 433 at 438.

This leaves then only the contention by Western that Mrs. Jones voluntarily cancelled the policy June 4, 1953, and accepted a return of all premiums paid. It is sufficient here, we think, to say that, based as it was upon the express premise that there had been a misrepresentation as to ownership—a contention now held by us to be groundless—legal consideration is doubtful; and, in any case, liabilities with respect to the accident of April 23 had already attached, especially since this was an effort to destroy, without her participation or consent, valuable rights which Mrs. Lola Jones Cutshall (and General claiming through her) then had for defense and indemnity. Of course, holding as we do that the policy was valid, the premiums must be restored under Mrs. Cutshall's tender to do equity.

The cause is therefore reversed and here rendered

to declare that Western is liable to the full extent of the limits of its policy and General is liable only for the excess, if any.

REVERSED AND RENDERED.

A True Copy:
Teste:
[Seal]

/s/ Edward W. Wadsworth
Clerk of the United States Court of Appeals for the Fifth Circuit.

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari has been served upon Mr. Carlisle DeHay, counsel for respondents, by depositing the same in the United States Post Office at Lubbock, Texas, with first class postage prepaid, this 25th day of April, 1957.

CRENSHAW, DUPREE & MILAM

By Chas. C. Crenshaw

FILED
MAY 27 19
JOHN T. FEY,

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. 941

WESTERN FIRE & CASUALTY COMPANY,
Petitioner,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR GENERAL INSURANCE COMPANY OF AMERICA, ET AL., IN OPPOSITION

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BRIEF FOR GENERAL INSURANCE COMPANY OF AMERICA, ET AL., IN OPPOSITION

OPINIONS BELOW.

The District Court prepared no opinion. Its findings of fact and conclusions of law (R. 19-29) are not reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 179-191) is reported in 241 F. (2) 289.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered and entered January 31, 1957 (R. 192). The petition for a writ of certiorari was filed on April 26, 1957. The jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there is evidence, which might admit of a different interpretation, that a local recording agent of an insurance company is advised of the facts concerning the ownership of an automobile and by virtue of such knowledge the insurance company is estopped from voiding the insurance policy on the ground of violation of the sole and unconditional ownership provision and is deemed to have waived the condition concerning ownership.

2. Whether the decision of a Court of Appeals may be disregarded when there is evidence to support the holding, which evidence might be susceptible of two different interpretations.

3. Whether the Texas law is that an insurance company can be estopped to claim the defense of breach of the sole and unconditional ownership provision of a policy, and can be deemed to have waived a breach of that policy when its local recording agent is advised as to the actual ownership of an automobile which he insures for and on behalf of the insurance company.

4. Whether an insurance policy can be reformed to show an additional named insured by reason of the knowledge concerning ownership of the insured automobile by a local recording agent.

STATUTES AND FEDERAL RULES AND REGULATIONS INVOLVED

The Federal Declaratory Judgment Act, 62 Stat. 964 (1948), as amended, 63 Stat. 105 (1949), as amended 68 Stat. 890, 28 U. S. C. Sec. 2201 (1954) (Supb. 1956), and pertinent portions of federal rules, Fed. R. Civ. P. 52(a) are set out in the appendix.

STATEMENT OF THE CASE

Respondents accept petitioner's statement of the case with the following exceptions;

1. Petitioner says that the trial court concluded that its policy, issued upon the misrepresentation of the named insured and as a result of collusion of the agent with the insured and her minor son, was void. Respondents say that on the basis of the findings of fact made, the trial court concluded that the false material representation as to the sole and unconditional ownership of the Plymouth automobile voided the policy issued by petitioner in the name of Eunice V. Jones. The trial court did not conclude that the policy was voided as a result of collusion of the agent with the insured and her minor son. (R. 29.)

2. The Court of Appeals reversed the judgment of the trial court on the ground that the findings of the trial court

were clearly erroneous and that petitioner's policy should be reformed because it was validly issued and the ownership was incorrectly described. (R. 27.)

3. Petitioner says that within a short while after the accident it cancelled its policy and returned the premiums and they have been retained by the named insured. It is not believed that petitioner will deny that by letter dated February 22, 1957, respondents' counsel forwarded by registered letter, return receipt requested, a check to petitioner's counsel for the premiums which had been returned in accordance with respondents' tender and offer to do equity made in the pleadings originally filed in this lawsuit.

REASONS FOR DENYING WRIT

This is a controversy between two insurance companies involving the question which one is liable for the loss. The questions that are involved are not matters of grave public importance, and will not hinder or obstruct the future administration of the law. Respondents appealed the judgment of the trial court based upon findings of fact and conclusions of law to the Court of Appeals for the Fifth Circuit on the ground that such findings of fact and conclusions of law were clearly erroneous. The Court of Appeals agreed with respondents' contention that the findings of fact which supported the trial court's conclusions of laws were clearly erroneous.

1. The holding of the Court of Appeals depended on its interpretation of the evidence presented below. Its inter-

pretation of that evidence differed with the interpretation of the trial court. The trial court found as a fact that there was a material misrepresentation as to sole and unconditional ownership of the automobile to petitioner; on the basis of this fact, the trial court concluded that this false material misrepresentation as to the sole and unconditional ownership of the automobile voided the policy. On the same evidence as to the sole and unconditional ownership of the automobile and the representations that were involved, the Court of Appeals concluded that petitioner's recording agent knew the named insured was not the sole and unconditional owner of the automobile and thereby waived the conditions in the policy with respect to the ownership of the automobile and that by reason of his knowledge, his principal, petitioner, was bound. In such a situation, we submit this Honorable Court should adhere to its rule of non-interference where the conclusion of the Court of Appeals depends on an appreciation of circumstances which admit of different interpretations. National Labor Relations Board vs. Pittsburg S. S. Company, 71 S. Ct. 453, 340 U. S. 498. United States vs. Johnston, 45 S. Ct. 496, 268 U. S. 220. Federal Trade Commission vs. American Tobacco Company, 47 S. Ct. 662, 274 U. S. 543.

2. The Court of Appeals found there was an entire want of evidence to support the fact of misrepresentation of sole ownership in the mother, Mrs. Eunice V. Jones. On the contrary, the Court of Appeals found, and the record amply supports it, that the testimony of the mother and the son

was to the effect that they gave agent Hutson all of the facts concerning the nature of Sherman's ownership and interest in the car. The evidence clearly demonstrated that agent Hutson knew of Sherman' sinterest and ownership in the car for the liability premium coverage was paid for by Sherman's check in the exact amount charged for liability coverage, was calculated under the Texas Manual Rate for drivers under the age of 25, and upon delivery of the policy agent Hutson likewise delivered both to Sherman Jones and Mrs. Eunice V. Jones in their respective names an identification card showing that the 1950 Plymouth was covered by petitioner. The Court of Appeals correctly held that the findings with respect to misrepresentation were clearly erroneous under Federal Rules of Civil Procedure 52 (a). It is manifest that Sherman Jones and Mrs. Eunice V. Jones did not have the desire to misrepresent any facts and certainly did not attempt to conceal or misrepresent anything in their conversation with agent Hutson. They disclosed all. If these two people were seeking to mastermind an effort to misrepresent ownership of the automobile which they were seeking to insure by reason of the financial responsibility law of the State of Texas, they certainly would not have disclosed and revealed to Mr. Hutson the fact that another agent there in Littlefield, Texas, would not let Sherman have insurance. (R. 139.) Their disclosure to Mr. Hutson did not have the taint of anything secret nor did they keep anything to themselves concerning their efforts to secure insurance or as to the ownership of the automobile they were seeking to insure.

For people who had no knowledge about insurance matters as to title, etc., their disclosure could not have been more complete to agent Hutson. They were his customers and they were looking to him for liability coverage on the Plymouth automobile.

Agent Hutson had knowledge of the ownership and interest of Sherman in the Plymouth automobile under well-established rules of law followed in Texas where a recording agent has such knowledge, the insurance company is charged with that knowledge and is therefore deemed to waive the conditions in the policy with reference to the ownership of the automobile. In *Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 6, Sec. 3629, p. 251,* the rule is stated:

> "Where an agent of the insurance company is aware of the fact that the insured is not the unconditional owner thereof, when he writes the policy upon the automobile, the insurer is charged with such knowledge and in consequence is deemed to waive the conditions in the policy with reference to the ownership of the automobile."

This statement of the law was cited with approval in the recent Texas case of *Traders & General Insurance Company vs. Lucas, 281 S. W. (2) 188 (Galveston Civ. App., 1955, writ ref. N. R. E.).* The same rule is announced in a fire insurance case in *Camden Fire Insurance Association vs. Wandell, Tex. Civ. App., 195 S. W. 289,* and in *Commercial Standard Insurance Company vs. Paul, 245 S. W. (2) 775, (Ct. of App. of Tennessee, 1951).*

Where the agent has knowledge of the true ownership of the automobile, the insurance company is charged with that knowledge under Texas law.

The finding of fact of the trial court concerning collusion between Mrs. Eunice V. Jones, Sherman L. Jones and agent Hutson is actually without foundation itself, even though this is not a basis upon which the trial court concluded that there was no liability in so far as petitioner was concerned. While agent Hutson was being examined by respondents' counsel, he was asked the following questions and made the following answers:

> "Q. Isn't it a fact that you made a statement to Mr. McElhannon, who is sitting out there right now, that you knew that Sherman Jones had an interest in the 1950 Plymouth?
>
> "A. I never made no such statement as that to Mr. McElhannon or anybody else that I knew because I was just going by Mrs. Jones writing the policy and had insured her before and told her I had to transfer the policy like it was, and did transfer it. I never made any such statement as that to Mr. McElhannon or anyone else.
>
> "Q. You deny you made that statement to him, to the fact that you knew Sherman had an interest in that 1950 Plymouth?
>
> "A. Yes, sir, I didn't make that statement for I didn't know, and didn't know at that time and don't know it now.
>
> "Q. You deny you made that statement to him?
>
> "A. I sure do." (R.p. 152-153)

Mr. Hutson would certainly not have testified in that manner and with the force in which he did if there had

been any collusion between him and Sherman L. Jones and Mrs. Eunice V. Jones. As a matter of fact, Mr. Hutson denied emphatically that he knew that Sherman had an interest in the 1950 Plymouth in any respect and in any manner.

As the Court of Appeals recognized, considering agent Hutson's testimony in connection with the testimony from the special agent of petitioner who had supervision over Hutson, it was clear that there was no prohibition making the issuance of a policy unauthorized, but at most, petitioner had certain underwriting policies and instructions which the agents were to follow. This record patently demonstrates that at the time agent Hutson wrote the policy, he was acting as local recording agent for petitioner, he had authority to so act and was acting for and on behalf of petitioner with respect to the policy that was issued to Mrs. Eunice V. Jones and agent Hutson had authority to bind petitioner and did bind petitioner on the policy that was issued by him to Mrs. Eunice V. Jones. (R. 172.) If there was a scope of agency involved, it could hardly be established by the declarations of the agent in Texas. *2 Tex. Jur., Agency, Sec. 125; Foote vs. DeBogory, Tex. Civ. App., 179 S. W. (2) 983, error refused.* Likewise as the Court of Appeals held, the failure of agent Hutson to follow the instructions of petitioner concerning the business that was entrusted to him certainly does not indicate a lack of authority. *2 C. J. S., Agency, Sec. 95, p. 1203; Niagra Insurance Company vs. Lee, et al, Sup. Ct. of Texas, 73 Tex. 641, 11 S. W. 1024; Manhatten Life Insurance Company*

vs. Stubbs, Com. App., Tex., 234 S. W. 1099; Dewey T. Ross Engineering Corporation vs. Sonneman, Tex. Civ. App., 159 S. W. (2) 200; German Insurance Company of Freeport, Illinois vs. Gibbs, Wilson & Company, et al, Tex. Civ. App., 92 S. W. 1068, 96 S. W. 760, error refused. Actually, petitioner would like to escape liability in this case by saying that its agent's knowledge is not imputable to it. It cannot do this since under well-established Texas law, the knowledge of the recording agent under Article 21.09, Texas Insurance Code, and *Travers & General Insurance Company vs. Lucas*, supra, *Camden Fire Insurance Association vs. Wandell*, supra, and the authoritative *Balshfield Cyclopedia of Automobile Law and Practice, Vol. 6, sec. 3629*, supra, cannot be distinguished, evaded or brushed aside as of no consequence. They are controlling and were found to be controlling by the Court of Appeals.

The District Court case of *Hawkeye Casualty Company vs. Western Underwriters Association, 53 Fed. Supp., 256*, relied upon by petitioner, is not applicable because the only knowledge that agent had and consequently the only knowledge his company had was that the individual Borreson, was the owner of the automobile. This is clearly pointed up by the court's language on page 264: "Plaintiff was never informed and had no knowledge that Western Underwriters was the owner of the car and that Borreson had no interest in the title." On the contrary in our case, it was established that agent Hutson did have knowledge as to the ownership and interest in the car of Sherman which petitioner insured.

As to *Trinity Universal Insurance Company vs. Woody, 47 Fed. Supp. 327*, also relied upon petitioner, this case can give petitioner no comfort. It relies specifically upon the law of the state of New Jersey and is directly contrary to the law of the State of Texas as herein indicated. As a matter of fact, it is difficult to understand just what the facts and circumstances were in the Moody case, for just exactly what knowledge the agent had is not described or set out.

Material reliance is also placed by petitioner upon the case of *Didlake vs. Standard Insurance Company, 195 F. (2) 246*, a case decided under Oklahoma law. A careful reading of this case will show that it really stands for the propostion that misrepresentation as to sole and unconditional ownership is material to the risk insured concerning liability and property damage coverages. Actually the facts in the case demonstrate that the actual owner was a minor and he induced, by a preconceived design and plan, another adult to assume the role of owner. Such information with respect to the actual ownership was not made known to the agent and consequently was not known to the insurance company. It was stipulated in the case that the adult person was merely "fronting for the real owner in order to enable the real owner to secure the necessary financing for the purchase price of the automobile. This is an entirely different situation than the case before this Honorable Court.

As the Court of Appeals very cogently stated, the words typed in the declaration by agent Hutson in this case were an incorrect description of the state of the legal title, a

thing which is immaterial under the circumstances to the attachment of the risk and in no way contributed to the contingency or event—the accident, on which the policy obligations became due. It was therefore a binding contract, *Kuntz v. Spence, Tex. Civ. App., 48 S. W. (2) 413, reversed on other grounds Tex. Com. App., 67 S. W. (2) 254; Government Personnel Automobile Association vs. Haag, Tex. Civ. App., 131 S. W. 978, error refused; 38 A. L. R. (2) 948.*

8. Since the ownership of the automobile was incorrectly described and since the policy was validly issued the law is clear that it should be deemed reformed to show Sherman L. Jones as an additional insured. *Traders & General Insurance Company vs. Lucas*, supra; *Providence Washington Insurance Company vs. Rabinowitz, 5th Circuit, 227 F. (2) 800.*

Sherman L. Jones then becomes a named insured and as an owner of the described automobile, which as reformed will show the 1950 Plymouth, he then acquired ownership of the 1951 Ford which was involved in the accident and it was undisputed that both Sherman L. Jones and Mrs. Eunice V. Jones notified Western's recording agent Hutson within 30 days following the date of the delivery of the 1951 Ford automobile to Sherman L. Jones (R. 57.) The 1951 Ford automobile then replaced the 1950 Plymouth described in petitioner's policy for it was uncontradicted that the 1950 Plymouth automobile was traded in on the 1951 Ford automobile (R. 56, 66.) Therefore, the 1951

Ford meets all of the requirements of a "newly acquired vehicle" under Clause IV(4) of petitioner's policy (R. 49). This is what the Court of Appeals correctly held.

The fact that the intervention of the accident after the 1951 Ford was acquired, but before reporting does not vitiate or void petitioner's policy. 34 A. L. R. (2), p. 944.

4. Since petitioner's policy, as reformed by the Court of Appeals, was effective it was available to respondent Lola Jones Cutshall as an additional insured. This then brought into consideration the provision in respondent General's policy which prescribed that the drive-other-car extension agreement V "shall be excess insurance over any other valid and collectible insurance available to the insured under a policy applicable with respect to said automobiles or otherwise." General Insurance Co. of America, et al v. Western Fire & Casualty Co., opinion of Court of Appeals, Fifth Circuit at p. 295. The effect of this under the law, is that respondent Cutshall did not have insurance with respect to other vehicles driven by her until she had exhausted coverage elsewhere. Petitioner's policy is not exhausted by the payment of Eight Thousand Seven Hundred and Fifty Dollars ($8750.00) plus costs of court. Therefore, petitioner was and is liable to the full extent of the limits of its policy. The Court of Appeals was absolutely correct in so deciding.

CONCLUSION

The finding of fact by the trial court as to misrepresentation of the ownership of the car, and the finding as

to collusion between petitioner's recording agent Hutson, Mrs. Eunice V. Jones and Sherman L. Jones were without foundation and were clearly erroneous as decided by the Court of Appeals. A reading of the record will demonstrate that this is so. The evidence established there was no collusion, that the facts concerning the ownership and interest of the 1950 Plymouth automobile were made known to agent Hutson in every respect and detail, and the Texas law charges petitioner with the knowledge of its recording agent Hutson. Petitioner has certainly been accorded a fair adjudication of its rights and cannot escape the application of the established principle of Texas law set forth in the Lucas case, supra, the Wandell case, supra, and in Blashfield's Cyclopedia of Automobile Law and Practice, supra. A proper decision has been made in the case by the Court of Appeals.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

28 U. S. C. Sec. 2201 (1954) (Supp. 1956):

"Sec. 2201. Creation of Remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended Aug. 28, 1954, c. 1033, 68 Stat. 890."

Rule 52(a) Fed. R. Civ. Procedure:

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *."

CERTIFICATE OF SERVICE

A copy of the foregoing Brief for General Insurance Company of America, et al., in opposition has been served upon Crenshaw, Dupree & Milam, counsel for Petitioner, by depositing the same in the United States Post Office at Dallas, Texas, with first class postage prepaid, this 23rd day of May, 1957.

LEACHMAN, GARDERE, AKIN & PORTER,

By Scott J. Leachman